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INDEX

	Page
OPINIONS BELOW	1–2
JURISDICTION	2
QUESTIONS PRESENTED	2–3
STATUTES INVOLVED	3
STATEMENT	3–26
SUMMARY OF ARGUMENT	26–28
ARGUMENT	29–62
I. In determining the issues raised in these proceedings, it was essential that the Commission consider all of the facts and circumstances found to exist as to delivery of fruits and vegetables at New York and Philadelphia; and upon consideration thereof the Commission was warranted in its conclusion that the approved unloading charges were not shown to be unjust and unreasonable	29–51
II. In consideration of the differences in the circumstances and conditions as between the unloading of fresh fruits and vegetables at New York and the unloading there of other commodities without charge, the Commission was warranted in its conclusion that the approved unloading charges were not shown to be unduly prejudicial and preferential or unjustly discriminatory	51–54
III. The Commission was warranted in its conclusion that the unloading charges at New York and Philadelphia should be the same	55–62
CONCLUSION	62
APPENDIX	63–69

295759—54——1

CITATIONS

	Page
Adams v. *Mills*, 286 U. S. 397	40
Atchison, T. & S. F. R. Co. v. *United States*, 232 U. S. 199	40, 57
Ayrshire Corp. v. *United States*, 335 U. S. 573	59
Barringer & Co. v. *United States*, 319 U. S. 1	40, 41
Baltimore & Ohio R. Co. v. *United States*, 305 U. S. 507	36
Charges for Loading & Unloading Carload Freight, 269 I. C. C. 25	31–32, 34
Ex Parte No. 166, Increased Freight Rates, 270 I. C. C. 93	5
Interstate Commerce Commission v. *Hoboken R. Co.*, 320 U. S. 368	36
Interstate Commerce Commission v. *Stickney*, 215 U. S. 98	38
Kay v. *United States*, 303 U. S. 1	51
Loading & Unloading Carload Freight, 101 I. C. C. 394	31, 33
Los Angeles Switching Case, 234 U. S. 294	36, 40
Nashville Ry. Co. v. *Tennessee*, 262 U. S. 318	54
New England Coal & Coke Co. v. *N. & W. R. Co.*, 33 I. C. C. 276	31, 33
Pennsylvania R. Co. v. *Kittaning Co.*, 253 U. S. 319	30
Railroad Retirement Board v. *Duquesne Co.*, 326 U. S. 446	40
Richmond Chamber of Commerce v. *Seaboard A. L. R. Co.*, 44 I. C. C. 455	53
Seaboard A. L. R. Co. v. *United States*, 254 U. S. 57	53
Swift & Co. v. *United States*, 316 U. S. 216	36, 37
Tagg Bros. v. *United States*, 280 U. S. 420, 440–1	44
United States v. *Abilene & So. Ry Co.*, 265 U. S. 274	7
United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402	36
United States v. *Chicago Heights Trucking Co.*, 310 U. S. 344	58
United States v. *Hoffman*, 335 U. S. 77	51
United States v. *Pan American Petr. Corp.*, 304 U. S. 156	36
United States v. *Ruzicka*, 329 U. S. 287	51
United States v. *U. S. Smelting Co.*, 339 U. S. 186	36
United States v. *Wabash R. Co.*, 321 U. S. 403	36
Warehouse Co. v. *United States*, 283 U. S. 501	30
Wholesale Fruit and Produce Assn. v. *A., T. & S. F. R. Co.*, 14 I. C. C. 410	31, 32

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLEES

No. 481

FLORIDA CITRUS COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court of three judges is reported at 114 F. Supp. 420. The first report of the Interstate

Commerce Commission (R. 24)[1] appears at 272 I. C. C. 648, and its report on rehearing at 286 I. C. C. 119) (R. 23).

JURISDICTION

The final judgment of the district court was entered August 31, 1953 (R. 203), and the appeal was allowed October 28, 1953 (R. 220). The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted February 1, 1954 (R. 1555).

QUESTIONS PRESENTED

1. Whether, in the light of the peculiar conditions found to exist as to delivery of rail carload shipments of fresh fruits and vegetables at pier stations at New York City and at produce terminals at Philadelphia, the Interstate Commerce Commission acted within its powers in approving unloading charges by the railroad carriers at those places, over and above their charges for line-haul transportation.

2. Whether, in the light of the evidence before it, the Commission was warranted in its conclusion that the said unloading charges were not shown to be unjust and unreasonable.

3. Whether the evidence before the Commission warranted its finding that the said unloading charges were not shown to be unduly prejudicial or unjustly discriminatory as against fresh fruits

[1] As used herein, "R. —" refers to pages of the printed transcript of the record, and "O. R. —" to pages of the original record from the district court, not printed.

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and vegetables or unduly preferential of other traffic there unloaded by the carriers without charge.

4. Whether in the light of the evidence the Commission was warranted in finding that the charges for unloading at New York and Philadelphia should be the same.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act herein involved are set forth in the Appendix hereto.

STATEMENT

This is a direct appeal from the final judgment of a specially constituted district court, sustaining as valid in all respects the Interstate Commerce Commission's report on rehearing and its order in a proceeding entitled I. & S. (Investigation and Suspension) Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia;* and the Commission's order (R. 26) dismissing two complaints filed with it by certain of the appellants herein, bearing docket numbers 31105 and 31106, and each entitled *Florida Citrus Commission et al.* v. *The Baltimore and Ohio Railroad Company et al.* (R. 28 and 35).

The proceeding docketed as I. & S. No. 5500 was instituted by the Commission in 1947 after certain railroads (now appellees herein) had filed schedules proposing to establish charges for unloading

carload shipments of fresh fruits and vegetables at New York, N. Y., and Philadelphia, Pa., and numerous parties, including most of the appellants herein, had protested the said charges (R. 24a). Upon the filing of the protests the Commission, acting under 49 U. S. C. 15 (7), suspended operation of the rates and ordered an investigation to determine the lawfulness of the proposed charges (O. R. 409). Thereafter the railroads voluntarily deferred the effective date of the schedules pending determination of the said proceeding (R. 24a).

Following a hearing before a Commission examiner, at which evidence was presented by the railroads and numerous opposing parties, and after oral argument and reargument, the Commission, on October 4, 1948, issued its report (272 I. C. C. 648, R. 24) in which it found that the proposed unloading charges, increased 30% under Ex Parte 166, were just and reasonable. It thereupon vacated the suspension and permitted the charges to become effective on November 1, 1948 (R. 23a).

The said charges for unloading were in addition to the line-haul rates and as made effective were as follows on the respective commodities named:

	Per net ton
Citrus fruits	$1.95
Fresh fruits (other than citrus)	2.28
Melons (including cantaloups)	2.60
Vegetables, fresh or green, not cold pack or frozen	1.95
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.60

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Thereafter, on June 9, 1949, upon consideration of petitions for reopening and reconsideration filed by the appellants herein and others, the Commission reopened the proceeding for rehearing (R. 292), which was held in September, 1949. A proposed report by two examiners, in which they recommended that the Commission reverse its decision of October 4, 1948, was issued May 16, 1950 (R. 51). The railroads excepted (R. 23a) to the proposed report, to which exceptions the opposing parties replied (R. 23a), with the result that the Commission ordered (R. 317) a further hearing, which was conducted in June, 1951. The examiner's proposed report on that hearing was issued August 23, 1951 (R. 81), again recommending that the Commission find the questioned charges unlawful. Upon consideration of the entire record, including exceptions to the proposed report (R. 393) and replies (R. 453, 466) to the exceptions, the Commission, on May 7, 1952, issued its final report (286 I. C. C. 119, R. 23). Therein it found (R. 23bb) "that the charges under consideration (that is, those already in effect) are not shown to be just and reasonable" and "that the shippers should not be forced to pay more than $1.05, $1.35, and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect."[2]

[2] As before indicated, the charges then in effect were 30 percent higher than the original charges, reflecting general increases in rail rates authorized by the Commission in Ex Parte No. 166, *Increased Freight Rates*, 270 I. C. C. 93 and 403.

On the same date, May 7, 1952, the Commission entered its order (R. 25) canceling the considered schedules and discontinuing the proceeding. The railroads thereupon canceled the higher unloading charges in effect since November 1, 1948, and filed schedules making effective the charges of $1.05, $1.35 and $1.65, thus found by the Commission to be just and reasonable.

On September 22, 1952, certain of the plaintiffs herein filed with the Commission two complaints, one of them (No. 31105, R. 28) attacking the charges then in effect for unloading fruits and vegetables at New York, the other (No. 31106, R. 35) attacking the charges for unloading at Philadelphia. The complaints alleged, among other things, that the unloading charges were "unjust and unreasonable in violation of Section 1 of the [Interstate Commerce] Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having been included in the line-haul rates * * *" (R. 33, 40). Upon consideration of the record in the two proceedings, including the railroads' motions to dismiss (R. 1541), the Commission, on December 15, 1952, entered its order (R. 26) dismissing the complaints, stating among the reasons for the dismissal that the complaints assailed the unloading charges "on substantially the same grounds" as those on which the same parties had assailed them in I. & S. No. 5500.

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The principal issue presented in the Commission proceedings was whether the railroads might lawfully impose charges for unloading carload shipments of fresh fruits and vegetables at pier stations in New York City and at produce markets in Philadelphia, the unloading charges being in addition to the carriers' rates for the line-haul transportation. The facts as shown by the evidence[3] before the Commission are set forth in detail in its two reports (272 I. C. C. 648 and 286 I. C. C. 119, R. 24 and 23). The accuracy and completeness of the statement of facts there set forth appears to be undisputed. It is virtually the same as the factual statement contained in the proposed reports of the examiners (R. 51 and 81), to which the appellants herein did not except. For these reasons, and for the sake of brevity,

[3] At 13 different places in the brief of the Secretary of Agriculture reference is made to testimony and pleadings in other cases decided by the Commission, as to some of which it was necessary for counsel for the Secretary to go to the National Archives to obtain the cited data. See the Secretary's brief in No. 480, pp. 27, 28, 39 (3 references), 40, 41, 42 (3 references), 43 (2 references), and 44. This Court said in *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 288, that in a Commission proceeding "Nothing can be treated as evidence which is not introduced as such". Apparently the Secretary justifies his going outside the record in this case on the ground that the files referred to are "public records". In the *Abilene Ry.* case, however, this Court annulled an order of the Commission because one of its findings rested, in part, "upon data taken from the annual reports filed with the Commission by the plaintiff carriers *pursuant to law*" (p. 287). [Emphasis supplied.]

we here set forth only a summary or condensed statement of the facts, and for a more detailed statement we respectfully refer the Court to the Commission's reports above mentioned.

The arrangements as to unloading fruits and vegetables at New York and Philadelphia have been in effect for many years (R. 23c). They are covered by exceptions to the general rule stated in the governing tariff which is that shippers and consignees of carload freight must perform loading and unloading or make provision therefor at their own expense (R. 24b). The exceptions to that rule contemplate that the railroads shall perform the unloading of fresh fruits and vegetables at designated stations at the two cities named, without interference from consignees or receivers. Prior to November 1, 1948, there were no separate charges, in addition to the line-haul rates, for unloading fresh fruits and vegetables at those stations (R. 23b). Since that date separate unloading charges have been in effect, first, those approved by the Commission in its 1948 report plus the Ex Parte 166 increase, (R. 24r), and later the lower charges approved by the Commission in its report on rehearing in 1952 (R. 23bb) and under attack in this appeal.

Deliveries at New York City

(a) Pier-Station Delivery: Unloading Charges Assessed

There are two types of rail delivery of fresh fruits and vegetables at New York City. They

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are commonly referred to as "pier station delivery" and "team track delivery". At pier stations the unloading is performed by the railroads, for which service they assess and collect the charges now assailed. But when delivery is made at team tracks or railroad sidings, the consignees or receivers perform the unloading and of course there is no unloading charge by the railroads. Approximately 75 percent of the total volume of fresh fruits and vegetables consigned to New York City is delivered at railroad pier stations. (R. 23e.)

Rail freight cars loaded with fresh fruits and vegetables shipped from the South and West, upon arriving at points on the western or New Jersey side of the Hudson River, opposite New York City, are there loaded upon "car floats" and then floated across the river to the railroads' piers, which are located adjacent to the wholesale market area in the lower part of Manhattan Island (R. 23e). The several railroads have a total of nine piers equipped for the unloading of fruits and vegetables (R. 23e). The area covered by them is approximately 40 acres, of which one-half consists of the piers, and the remainder, the slips between the piers which accommodate the car floats (R. 23f).

The unloading performed by the railroads is from the cars (while still on the car floats) to the floor of the piers. There are no physical means by which consignees' trucks can reach the car

floats (R. 23g). The pier floor is the first place where, after the freight has been unloaded, delivery can be taken (R. 23g). In taking delivery there, the fruit and vegetable trade has the advantage of displaying the entire contents of a car to prospective buyers, of using the pier station facilities as a sales' mart, and of occupying auction-room facilities without special charge therefor (R. 23h).

The Commission's first report describes one railroad's method of unloading in the following language (R. 24d–24f):

> The Erie conducts its unloading of fresh fruits and vegetables at night, generally starting around 8 p. m. on weekdays and somewhat earlier on Sundays and holidays. Usually, the unloading operations are completed early the following morning, about 5 a. m. or 6 a. m. When a car is ready for unloading a crew of workmen places gangplanks in positions so that the lading can be removed from the cars onto the piers. Thereafter and during the course of the unloading operations this crew adjusts gangplanks to meet changing tide conditions, and performs other assigned duties. On occasion these workmen break the seals of the cars, remove wooden bracing from the cars, and dispose of such bracing, although these particular duties ordinarily are handled by so-called "wood gangs." The "unloading gangs", each comprising

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seven men, unload the cars. An "unloading gang" consists of one carman or checker who has charge of the crew, makes a tally of the contents of the car, and loads hand trucks in the car, a second carman who assists in the loading of hand trucks, three truckers who handle the loaded trucks from the car to the dock and return the empty trucks from the dock to the car, and two dockmen who unload the trucks on the dock and assort and stack the packages of freight on the pier floor. The "unloading gangs" also move commodities on the piers to make room for subsequent unloading operations. A crew of so-called "dock-counters" checks to see that the "unloading gangs" have placed the packages at the correct locations on the floor of the piers and sees that any improperly placed packages are moved to their assigned positions. Damaged containers are segregated and then moved to another location on the pier. If the lading is not damaged the packages are recoopered and returned to their indicated locations on the pier.

The above-described operations are performed by employees of the Seaboard Terminal and Refrigeration Company, hereinafter referred to as the Seaboard Company, pursuant to contractual arrangements between it and the Erie. In addition to the workmen referred to above, the Seaboard Company employs six or more float foremen who supervise the work of the "un-

loading gangs." These float foremen devote all of their time to this work. The Seaboard Company also employs "sweepers" who clean and sweep the Erie piers, removing the accumulated debris so that the required standard of sanitation may be maintained. The "sweepers" may be assisted by the "unloading gangs" when the latter are not otherwise occupied. The Seaboard Company employs a night general foreman and three or more assistants to supervise all of the described operations; also a night time-keeper. The Erie supplies the Seaboard Company with office space at pier 21. Clerical and accounting work in connection with the unloading operations is performed by employees of the latter company at that location. The Seaboard Company also furnishes so-called "A-Line" men who handle damaged packages that have been recoopered, placing them in their regular stacks and setting aside packages that are not in acceptable condition so that they may be inspected and subsequently delivered to the consignee or a salvage agent. Another employee, known as a "seal and ice clerk," observes and records the amount of ice in the car bunkers, the position of ventilators, the condition of the car seals, and seals the cars when necesary.

"The described operations of the Erie and the practices in connection therewith are typical of other unloading operations at New York con-

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ducted by * * * the Baltimore & Ohio, Pennsylvania, and New York Central, except that the Pennsylvania uses mechanized equipment to move the produce from the cars to the pier floor". (R. 24g.)

Further with respect to pier-station delivery at New York, the Commission found (R. 23j) that:

> Prior to the arrival of the shipments at the piers, the carriers are informed of the contents of the cars, the names of the consignees, and other pertinent details. This permits notification of the receivers of the freight in advance of arrival and enables the carriers to allot space on their piers for each consignment. As regards the allotment of space, the piers are generally mapped out so as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers, who, prior to the auction, usually inspect the fruit while it is on display on the pier floor. Practically all the citrus fruit, as well as fresh fruit (other than citrus), after being unloaded on the piers, is sold at public auction in rooms on the second floors of the piers assigned for that purpose. Cantaloups and melons, as a rule, are not sold at auction, but are bought at private sales on the pier floor where the packages are displayed. Fresh or green

vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes, they are not sold at auction.

The costs per ton of unloading[4] fresh fruits and vegetables (not including the costs of sorting and stacking, for which a separate charge is made, R. 24i) at New York pier stations during given periods from 1946 to 1949 were shown to be as follows (R. 23j), the lowest and highest figures for each commodity here stated:

Citrus fruit	from	$1.76	to $2.22
Other fruit	from	2.49	to 3.23
Melons and cantaloups	from	2.63	to 4.11
Fresh vegetables (not top-iced)	from	1.72	to 2.62
Fresh vegetables (top-iced)	from	2.70	to 4.11

These prices have risen sharply in recent years, the cost to one railroad being 96 percent greater on December 31, 1946, than immediately prior to

[4] The Commission found (R. 24–1) that "The unloading of melons, top-iced vegetables, and deciduous fruits requires more time and more care than in the case of citrus fruits. Thus, unloading costs for citrus fruits are lower than for other commodities. The additional expense of unloading top-iced vegetables and melons results from the difficulties encountered in removing the ice in order to reach the packages, from the great care which must be exercised in handling the packages to keep the produce in good condition, and from the fact in the case of melons that they are easily damaged. There also are added costs for cleaning the pier or terminal floor and confining the water from the melted ice. The higher costs of handling deciduous fruits results from the fact that these products are shipped in relatively small boxes. A citrus carload consists of 525 boxes, as compared with 1,500 boxes for a carload of cherries, 1,050 boxes of plums, and 800 boxes for peaches."

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World War II, and being even higher in June 1951 (R. 23j).[5]

(b) Team-Track Delivery: No Unloading Charge

Team-track delivery on Manhattan Island is quite different from pier-station delivery, although in both operations the movement across the Hudson River is identical. However, when cars for team tracks reach Manhattan they are accorded additional switching to reach the team-

[5] The record shows that the appellants declined to cross-examine the railroad witnesses who testified as to the costs to the carriers of performing the unloading at both New York and Philadelphia (R. 1246–1247):

"Mr. LaRoe [Attorney for Port of New York Authority]. Mr. Examiner, in accordance with your suggestion, counsel for the protestants conferred during the recess and concluded that they would not cross examine any of the witnesses.

"Exam. Brown. Have you any statement to make in connection with your failure to cross examine?

"Mr. LaRoe. Yes. We fail to cross examine, not because we accept the figures as accurate, but because we feel that, whether they are accurate or not, they have nothing to do with the issue in the proceeding because it is quite immaterial, as we see the case, what the cost of unloading is.

"Exam. Brown. The Commission might disagree with you on that point. They might consider that the unloading charges should be considered separately from the line-haul charges. Have you lost any rights in your failure to cross examine?

"Mr. LaRoe. Well, that is a risk we have to take, and we are willing to take it.

"Exam. Brown. All right, sir. There will be no cross examination of these cost accounting witnesses; therefore, they are now excused."

track yards. After placement of a car on a team track, the consignee has two days free time to unload it. He unloads directly from the rail car to his trucks. There is more car detention and more switching, and the unloading process is substantially longer, with respect to team-track delivery than with pier-station delivery. (R. 23i.)

Most of the railroads have team-track yards on the New Jersey side as well as the Manhattan side of the Hudson River, and at least one of them (the Pennsylvania) prefers to deliver fruit and vegetables at Jersey City team-track yards rather than at New York piers, on account of the difficulties and expense of car-float service. (R. 23k.) The Commission found, however, that "Receiving fruits and vegetables at team tracks in New Jersey would be inconvenient to the public because the vast volume of these commodities consigned to New York is consumed east of the Hudson River" (R. 23k); also, that the present location of the wholesale produce markets, on the lower west side of New York, adjacent to the pier stations, and convenient to the area of greatest consumption, would change if the railroads should continue to increase their deliveries on the New Jersey side. Such a change in the location of the markets would require trucking of the cargoes from Jersey City to New York City, which would cause highway traffic congestion and much delay. (R. 23–1.)

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Team-track facilities on Manhattan Island are inadequate to accommodate more than a relatively small part of the total volume of fruit and vegetable traffic consigned to New York City (R. 24h), and it would be impracticable, if not impossible, to expand those facilities to the extent necessary to accord such delivery to all of the traffic (R. 23n). The inhabitants of the City consume over 5 billion pounds of fruits and vegetables per year, and the unloading charges assessed and collected by the railroads are ultimately borne by these consumers (R. 23o).

Contrasting pier-station delivery with team-track delivery, the Commission found that "The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee" (R. 23n).

Deliveries at Philadelphia

(a) Produce terminal delivery: Unloading charges assessed

Prior to 1927 fresh fruits and vegetables received at Philadelphia were distributed from Delaware River piers in unloading operations similar to those presently conducted at New York piers, and without charge therefor by the railroads other than the line-haul rate. During 1927 the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce termi-

nals, at both of which unloading as previously performed at the piers was continued at the line-haul rate. These terminals are 3½ and 4 miles, respectively, from the produce market area of Philadelphia (R. 23r).

Since construction of the produce terminals in 1927, the greater portion of the total volume of fruits and vegetables consigned to Philadelphia has been delivered at the terminals (R. 23r). The Pennsylvania's terminal consists of two platforms or sheds, each with a floor space of 83,600 square feet (R. 24j). One platform is used principally for unloading fruits and vegetables to be sold at auction, and the other for fruits and vegetables intended for private sale (R. 23r). It is only at these platforms that the railroad performs the unloading (R. 23s). It maintains auction rooms for the convenience of the trade and provides heat and light throughout the terminal (R. 24k). The only change in the operations since November 1, 1948, is that the Pennsylvania now charges for the unloading service, and now refuses the consignees the privilege of unloading their own freight on the platforms if they elect to do so (R. 23s).

The Baltimore & Ohio and the Reading operate a joint produce terminal at Philadelphia, at which unloading on the terminal platform is performed by railroad employees in much the same manner, with comparable benefits to the trade, and

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at the same charges as at the Pennsylvania's produce terminal (R. 23s).

The per ton costs to the railroads of performing the unloading service at produce terminals in Philadelphia during given periods was shown to be as follows (R. 23x):

	Penn.	*B. & O.*
Citrus Fruit	$1.91	$1.23
Other fresh fruit	2.53	1.53
Melons	3.42	
Vegetables (not top-iced)	1.91	

No separate charge is made by the railroads for sorting fruits at Philadelphia, the cost of that service being included in the charge for unloading (R. 23x).

(b) Team-track delivery: no unloading charge

Each railroad delivering fresh fruits and vegetables at Philadelphia also has team track facilities there, at which consignees may unload the commodities directly from rail car to truck, and, of course, without paying the railroad an unloading charge. As to this type of unloading, the Commission found (R. 23t):

> * * * Since the unloading charges became effective, 63 per cent of the commodities originally unloaded, sorted, sold, and delivered on the terminal platform is now unloaded on team tracks by consignees.
>
> Receivers of fruits and vegetables in Philadelphia who formerly, in many instances, unloaded their own freight at the terminal platforms are dissatisfied with

> the arrangement under which they must either unload at team tracks or have the unloading at the platforms, for which charges are collected, performed by the carrier. * * *

As to the adequacy of team tracks at Philadelphia, and the desirability to the consignees of using them, the Commission found (R. 23y):

> The team-track facilities are sufficient to accommodate a large number of cars. There is no indication that these facilities are inadequate to accommodate the fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services. However, *team-track delivery is not desired for fruit, the auction facilities being more desirable.* At certain times there has been congestion at team tracks as a result of the manner in which trailer-trucks were placed in the driveways. Those driveways are 65 feet in width and are comparable with those at team tracks generally. *Except during the strikes or similar conditions, there has been no time when the team-track capacity at Philadelphia has not been sufficient to accommodate all cars unloaded at the produce terminals in addition to those unloaded at the team tracks.* The team-track capacity can be increased. However, delivery on the terminal platforms is more advantageous than team-track delivery to the Philadelphia consignees. (Emphasis added.)

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Deliveries at Other Cities: Unloading Charges Assessed

In all cities in Official Territory,[6] except New York and Philadelphia, railroads delivering carload freight to receivers at station platforms, have for many years performed the unloading only at an additional charge. Otherwise stated, New York and Philadelphia were the only places where, prior to November 1, 1948, no separate charges were made for unloading services performed by carriers (R. 24c). Moreover, "The relative level of the rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading" (R. 24q).

Discussing this situation, the Commission stated in its first report (R. 24b):

> There has been a gradual elimination of so-called free unloading of carload freight by the carriers in official territory. It does not appear that there are points other than New York and Philadelphia that are exceptions to the general rule that the obligation of unloading carload freight rests with the shippers. Formerly, the carriers made exceptions to this rule at Chicago, Buffalo, Pittsburgh, and certain port cities to meet competitive situations at those points, and for some time where loading and unloading of carload freight was per-

[6] Roughly, the States north of the Potomac and Ohio Rivers and east of the Mississippi, plus portions of Virginia, Kentucky, Missouri, and Iowa. 164 I. C. C. 314, 322.

formed by the carriers there was no charge. In 1924, however, the carriers began discontinuance of this practice where appropriate. During that year tariffs became effective which provided for loading and unloading charges at the interior cities just mentioned, but not at the ports. This difference in treatment was due principally to water competition. Water carriers generally load and unload at their own expense and apparently the rail lines then felt that they could not compete effectively if they were to establish loading and unloading charges in the absence of similar charges by the water lines. Loading and unloading by the railroads, without charge, was continued at the port cities for some years thereafter. In the years following 1925, loading and unloading service by the carriers without charge was discontinued at many other interior points in official territory until finally New York and Philadelphia remained the sole exceptions.

In this connection it should be mentioned also that the line-haul rates for transporting carload freight to New York City from points in other states are the same, or are on the same basis, whether the freight is unloaded by the carriers and delivered on station platforms (including pier stations), or delivered to and unloaded by consignees at team-tracks. The same is true as to the line-haul rates to Philadelphia.

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The Commission's conclusions

Considering all the facts the Commission concluded that "the present method of handling shipments through the pier stations [at New York] is of benefit to both shippers (including consignees) and carriers. It is also helpful in the avoidance of traffic congestion. The acquisition of land in that area for additional track facilities would be impracticable if not impossible. The [carriers] have been willing to perform the unloading without a separate charge until, in recent years, the cost thereof substantially increased. Upon this amplified record we conclude, as hereinafter explained, that the cost of unloading should be borne partly by the shippers and partly by the [carriers]." (R. 23z)

Treating as "unsound" the contention of the then protestants (now the appellants) that the cost of unloading should be borne by the railroads because they do not provide team tracks adjacent to the pier stations, the Commission pointed out that "physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this congested area is to be served by railroad transportation. * * * there is little likelihood that the ship-

pers would divert any substantial amount of this traffic from the pier stations as long as they are able to obtain the present terminal services at costs which are not unduly burdensome to them or unduly disproportionate as compared with total costs to them of a satisfactory substitute for pier deliveries. * * *" (R. 23z.)

Answering one of the principal arguments then and now made by the protestants (appellants), the Commission stated that "the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect". (R. 23aa.)

The Commission's ultimate findings (R. 23bb) were (1) "the shippers should not be forced to pay more than $1.05, $1.35, and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect"; (2) the charges at New York and Philadelphia should be the same; (3) the "record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 and 3 of the act"; and "the charges under consideration [i. e., the higher scale of charges] are not shown to be just and reasonable, and * * * will be ordered canceled * * * without prejudice to the establish-

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ment of charges in conformity with the views expressed herein".

Following entry of the Commission's order (R. 25) canceling the higher unloading charges, the railroads filed new schedules making effective the approved lower charges. Thereafter, on September 22, 1952, certain of the appellants herein filed with the Commission two complaints (R. 28 and 35) attacking the then effective lower charges as "unjust and unreasonable in violation of Section 1 of the Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading having been included in the line-haul rates". On December 15, 1952, the Commission entered its order (R. 26) dismissing the two complaints, among other reasons because they assailed the unloading charges "on substantially the same grounds" as those on which the same parties had attacked them in the previously concluded proceeding, I. & S. No. 5500.

The complaining parties, Florida Citrus Commission and others, thereafter brought this suit to set aside the Commission's orders (R. 1). The United States and the Commission filed separate answers (R. 199 and 178), the answer of the United States being a "neutral" one. (R. 199.) With leave of the court numerous other parties intervened as plaintiffs and filed their complaints, adopting for the most part the allegations of the complaint originally filed (R. 117, 131, 134, 151,

154, 157, 174). And the railroads, having been permitted to intervene as defendants, filed their joint answer seeking to uphold the Commission's order (R. 197).

At the hearing before the three-judge district court, a complete transcript of the proceedings before the Commission, including exhibits, was introduced in evidence. The court's opinion and its judgment dismissing the suit were filed August 31, 1953 (R. 203–215).

SUMMARY OF ARGUMENT

I

What the appellants sought of the Commission was an order disallowing all charges for unloading carload shipments of fresh fruits and vegetables at New York and Philadelphia on the ground that compensation for the unloading service was included in the carrier's line-haul rate and the additional charges would represent duplicate payment for the same service.

In deciding the question, however, the Commission could not overlook the following factors: According to well-established rule the duty of unloading carload freight ordinarily rests upon the shipper or consignee; New York and Philadelphia were the only places where, prior to November 1, 1948, carriers made no separate charges for unloading such commodities; the level of line-haul rates on the movement of fresh fruits and vegetables from producing points to New

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York and Philadelphia was not higher than the rates to other consuming points where consignees unloaded or separate charges were assessed for unloading; the level of such rates was the same whether the shipments were unloaded by the carriers at pier stations in New York (platforms in Philadelphia) or by the consignees at team tracks; the cost of pier-station and platform unloading, performed by the carriers, had increased considerably in recent years; and consignees received numerous and very substantial benefits in connection with the unloading service performed by the carriers.

Taking these factors into account, the Commission could properly, and did, find that the cost of the unloading should be borne partly by the shippers (or consignees) and partly by the carriers; and that, while the charges proposed by the carriers were not shown to be just and reasonable, it would be lawful for them to establish a lower scale of unloading charges determined by the Commission to be just and reasonable upon consideration of all the evidence.

II

The Commission was warranted in finding and concluding that the approved unloading charges were not shown to be unduly prejudicial and unjustly discriminatory as against fresh fruits and vegetables transported to New York, and unduly preferential of other traffic there un-

loaded by the carriers without charge. The numerous and substantial benefits shown to be enjoyed by consignees of fresh fruits and vegetables unloaded by the carriers at pier stations in New York, which benefits were not shown to be enjoyed by consignees of other freight there unloaded, afford a rational basis for this finding and conclusion.

III

Notwithstanding the evidence that the cost to the carriers of performing the unloading service was greater at New York than at Philadelphia, the Commission was warranted in its finding and conclusion that the unloading charges should be the same at both places. This finding and conclusion has substantial support in the evidence, including evidence that at Philadelphia, in connection with the unloading service, the carriers also perform, without a separate charge, the service of sorting the merchandise according to types and grades, to facilitate its display and sale by the consignees, whereas at New York a separate charge is made for sorting and stacking.

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ARGUMENT

I

In determining the issues raised in these proceedings, it was essential that the Commission consider all of the facts and circumstances found to exist as to delivery of fruits and vegetables at New York and Philadelphia; and upon consideration thereof the Commission was warranted in its conclusion that the approved unloading charges were not shown to be unjust and unreasonable

The appellants alleged in their complaint that the unloading charges approved by the Commission and now in effect "are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates" (R. 18). This contention raises the principal issue presented to the Court for decision.

The appellants' contention appears to be that the carriers' rate for line-haul transportation includes delivery of the merchandise at destination and necessarily includes the service of unloading when performed by the carriers, regardless of the cost of that service, the substantial benefits derived by the consignees therefrom, or any of the other facts and circumstances found to exist in connection with the unloading.

Sections 1 (4) and 1 (5) of the Interstate Commerce Act, relied upon by the appellants,

provide in substance that common carriers by railroad shall establish "just and reasonable" rates and charges for transportation, that "all charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable", and that "every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful".

At the outset of its consideration of this question the Commission referred (R. 24b) to the general rule long recognized by this Court, that the "duty of loading and of unloading carload shipments rests upon the shipper or consignee". *Pennsylvania R. Co.* v. *Kittaning Co.*, 253 U. S. 319, 323; *Warehouse Co.* v. *United States*, 283 U. S. 501, 504.

The carriers' effective tariff states this general rule and provides for exceptions thereto in the following language[7] (R. 24b):

> Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carriers at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier.

[7] Rule 27 of the Consolidated Freight Classification.

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The arrangements as to unloading at New York and Philadelphia, also the unloading charges under consideration, are covered by exceptions to the governing classification (R. 24b).

"There are no physical means by which consignees' trucks can reach the car floats" at New York (R. 23g), hence it is necessary for the carriers to perform the unloading there. It being necessary for them to perform the service, the question presented is whether in all events and under all circumstances they are required to perform it under their rates for the line-haul transportation. Otherwise stated, are unloading charges unlawful *per se*?

In deciding this question in the negative and holding that, under the facts and circumstances shown to exist, the imposition of additional charges for unloading would be just and reasonable, the Commission followed its many decisions to the effect that such accessorial services as loading and unloading are not necessarily included in the line-haul rates, and that whether they are to be included or separate charges allowed therefor must be determined according to the peculiar facts and circumstances of each case. *Wholesale Fruit and Produce Assn.* v. *A., T. & S. F. R. Co.,* 14 I. C. C. 410 (decided in 1908); *New England Coal & Coke Co.* v. *N. & W. R. Co.,* 33 I. C. C. 276 (1915); *Loading and Unloading Carload Freight,* 101 I. C. C. 394 (1925); *Charges*

for Loading and Unloading Carload Freight, 269 I. C. C. 25 (1947).

In explaining its conclusion the Commission said: "For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates. The establishment of specific charges for unloading at New York and Philadelphia, without reference to the levels of the line-haul rates, is justified. Such charges are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published. * * *" (R. 24q.)

In the *Wholesale Fruit* case, *supra,* the Commission had for consideration, as it did in the instant case, the question of the legality of a separate charge for unloading carload shipments of fresh fruits and vegetables (at Chicago). There one of the carriers, instead of delivering carloads of fruit in packages on team tracks, delivered them at fruit houses or platforms owned and controlled by the carrier. The platforms and fruit houses were provided by the carrier for unloading and sorting the merchandise and to protect it from freezing, and a separate charge was imposed for the unloading, in addition to the line-haul rate.

The Commission's decision was (1) that there is no hard-and-fast rule of law as to the consignee's duty to unload carload freight, but that

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in each case it is necessary to consider the nature of the commodity and the factual situation at the unloading place; (2) that as a practical matter it was necessary in the considered case for the unloading of the cars of fruit to be done by the carrier; (3) that it was necessary for the carrier to have exclusive control of the fruit platforms and fruit houses; and (4) that the maintenance of those facilities, together with the extra labor necessary, entailed upon the carrier an additional expense for which a charge might reasonably be made in addition to the published rate for transportation.

In the *New England Coal* case, *supra,* in upholding the legality of a railroad's charge for dumping (unloading) coal in addition to the rate for the line haul, the Commission said, "When delivery must be made in a peculiar way the carrier is entitled to an extra charge therefor" (33 I. C. C., at 279).

Another proceeding before the Commission in which was involved a question quite similar to that now before the Court was *Loading and Unloading Carload Freight,* 101 I. C. C. 394. There the Commission said (at 413):

> Protestants particularly urge that the line-haul rates include loading and unloading, and that under the law respondents not only have to justify the charge for those services but the burden is upon them to show that the line-haul rates heretofore

> contemplating the loading and unloading services are reasonable when demanded by the respondents for the road haul alone. * * *
>
> * * * Many of the line-haul rates to and from these points have been prescribed or approved by us, and our reports do not indicate that we have given any consideration to the cost of unloading carload freight in arriving at such rates. The same line-haul rates are assessed on shipments to and from industrial sidings or outlying team tracks at these points although the loading and unloading is not performed by the carriers. The same rates, or the same bases of rates, apply to or from other points in the same group or for a similar distance, and the rates do not include loading or unloading. All of these facts indicate that the general measure of the rates to and from the points in question are not unreasonable for the line-haul service alone, and warrant the conclusion that if the carriers justify the charge for the loading and unloading services, they have borne their burden of proof under the law.

Virtually the same question was presented to the Commission in the recent (1947) case of *Charges for Loading and Unloading Carload Freight,* 269 I. C. C. 25. In upholding the lawfulness of the considered unloading charges over and above the line-haul rates, the Commission based its conclusion upon findings (in addition to findings as to the cost of rendering the un-

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loading service) that the line-haul rates were the same as those which applied on traffic when no unloading service was performed; that they applied on that traffic regardless of whether a loading or unloading service was performed; and that the line-haul rates, many of which had been prescribed or approved by the Commission, must, unless otherwise shown in a proper proceeding, be presumed to be just and reasonable.

No court attack was made upon the Commission's orders in any of the four proceedings discussed next above, according to our best information.

These four Commission decisions, among many to the same effect, should be sufficient to demonstrate that there is nothing novel or revolutionary about the Commission's determination of the instant case. On the contrary, the Commission's decision herein was in accord with principles of law long followed by it. The basic question before the Commission was whether a terminal service, i. e., the considered unloading service, should in the circumstances involved be treated as a part of, or in addition to, the service covered by the line-haul rate. The district court held, in accordance with precedents established by this Court, that the question was one upon which the findings of the Commission were conclusive if supported by substantial evidence.

This Court has said that "the Commission's determination of the point in time and place at

which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts." *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U. S. 368, 378. Also, "That the Commission is authorized to establish the point where line-haul service begins and ends is not to be doubted. The question, in reviewing the Commission's determination of the convenient points at which line-haul or carrier transportation service begins and ends, is whether such determination is supported by substantial evidence * * *". *United States* v. *U. S. Smelting Co.,* 339 U. S. 186, 193. To the same effect: *Los Angeles Switching Case,* 234 U. S. 294, 311–14; *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402, 408; *United States* v. *Pan American Petr. Corp.,* 304 U. S. 156, 158; *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 525–26; *Swift & Co.* v. *United States,* 316 U. S. 216, 222; *United States* v. *Wabash R. Co.,* 321 U. S. 403, 408.

In the *Tin Plate* and *Pan American* cases, *supra,* this Court accepted as controlling the Commission's findings that under the conditions shown to exist, the interchange tracks of the industry were convenient and usual points for the receipt and delivery of the interchanged cars, that the rail line-haul service accordingly ended there, and for that reason the industry performed no service in spotting cars on its own tracks for which the rail carrier was compensated under its line-haul

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rates and for which the industry was entitled to be compensated by allowance out of the line-haul charges. In the *Tin Plate* case the Court said (301 U. S. 408):

> * * * The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service.

In further support of the proposition that it is within the Commission's province to determine what is within and what is without the service of transportation, it may be pointed out that this Court has held that whether a rail rate for line-haul transportation of livestock includes yardage charges (for such service as weighing, watering, feeding, or holding livestock in stockyards) is "a question to be decided by the Commission upon the facts of each particular case, and not by mechanical application of a fixed rule of law * * *. The propriety of the yardage charges in the present case was a question for decision by the Commission in the exercise of its judgment, and not for decision according to any fixed rule of law." *Swift & Co.* v. *United States,* 316 U. S. 216, 225.

The appellants insisted before the district court, and they still insist, that before separate unloading charges might lawfully be approved, it was necessary for the railroads to offer evidence and prove, and for the Commission to find, that the line-haul rates were inadequate to cover the unloading service also. When the Commission con-

sidered this contention, along with all the facts shown by the evidence, its conclusion was that "the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect" (R. 23aa).

If the Commission, in this proceeding, had gone more fully into the question of reasonableness of the line-haul rates, as the appellants contend it should have done, and if as a result it had required the carriers to reduce the level of those rates by the amount of the unloading charges, the obvious result would have been to establish rates for line-haul transportation to pier stations at New York and produce platforms at Philadelphia lower than the level of the charges assessed at other stations at those two destinations and at other points in the vicinity of those destinations. Merely to describe the situation should be sufficient to demonstrate that the resulting rates would be unreasonably low. A somewhat similar question was involved in *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, 105, where this Court said:

> * * * For services that it [the carrier] may render or procure to be rendered off its own line, or outside the mere matter of

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> transportation over its line, it may charge and receive compensation. *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297. If the terminal charge be, in and of itself, just and reasonable, it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust.

The district court's view as to this question was that "What the Commission is really deciding here is, not the adequacy or inadequacy of the line-haul rates to cover the unloading service, but where the carrier's line haul service ends, and whether unloading is a justifiable additional service, of value to the consignee, for which he should pay at least a part of the cost" (R. 213). The appellants contend that this holding of the District Court is not a correct description of the Commission's findings. This argument is erroneous. A review of the two reports of the Commission shows, we submit, that the District Court was right, because the Commission did conclude that the unloading service performed by the carriers was not a part of the transportation service re-

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quired of them under the line-haul rates, and further held that, "without reference to the levels of the line-haul rates", specific charges for unloading at New York and Philadelphia were justified. (R. 24q.)

Whether or not such a finding was made or may be inferred from the Commission's other findings and conclusions, no such specific finding was required as a basis for the Commission's order. This Court has expressly held that even though unloading may under some circumstances be considered a part of the transportation service, the cost of unloading "may be included in the line-haul tariffs or separately fixed or allowed as an additional charge". *Railroad Retirement Board* v. *Duquesne Co.,* 326 U. S. 446, 454, citing *Adams* v. *Mills,* 286 U. S. 397, 410–415.

The holding in *Adams* v. *Mills, supra,* was that the question whether a terminal service, in the particular facts and circumstances, was reasonably to be treated as additional to or as a part of the service covered by the line-haul rate was a question upon which the findings of the Commission were conclusive if supported by evidence; citing *Atchison, T. & S. F. R. Co.* v. *United States,* 232 U. S. 199, 221, and *Los Angeles Switching Case,* 234 U. S. 294, 310, 311.

Barringer & Co. v. *United States,* 319 U. S. 1, involved the lawfulness of a Commission order finding just and reasonable (1) the proposed elimination by rail carriers of loading charges on compressed cotton originating in Oklahoma and

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moving to Texas Gulf ports, and (2) the proposed retention of such charges on similar shipments moving to points in the Southeast, the circumstances as to the two movements being substantially different. On the question whether consideration might be given to a loading charge without regard to the line-haul rate, this Court said (at pp. 9–10):

> * * * the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge [i. e., loading or unloading charge], or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism.

While the facts in the *Barringer* case are not closely similar to those in the case now before the Court, that case is important as another recognition, not only by the Commission but by the Supreme Court, of the principle that a rail carrier's line-haul rate does not necessarily and in all instances include the service of loading or unloading; and that separate unloading charges are not unjust, unreasonable, and unlawful *per se,* but their reasonableness in a particular case is for the Commission to determine from the facts and circumstances in that case.

The Commission having made that determination in this case (that the challenged unloading

charges were not shown to be unjust and unreasonable), it would appear necessarily to follow, under the above-cited authorities, that the Commission's orders to that effect are not unlawful *per se,* and should be upheld if its determination is found to be supported by substantial evidence.

The evidence supporting the Commission's subordinate findings and its ultimate finding approving the now-assailed unloading charges is summarized in the Commission's two reports (R. 23 and 24), to which we again respectfully direct the Court's attention. We desire here to refer only to so much of the uncontroverted evidence, as in our opinion, affords substantial support for the Commission's finding and conclusion.

The appellants contend specifically that there is no evidence to support the finding that the unloading charges of $1.05, $1.35, and $1.65 are just and reasonable. This contention overlooks the very abundant evidence as to the cost to the railroads of performing the unloading service. That evidence shows the cost at more than double the charges approved by the Commission (R. 23j and 23x). It might have been sufficient to support the higher unloading charges previously in effect, except for the Commission's further finding that the cost of unloading should be borne partly by the consignees and partly by the carriers (R. 23z). That being true, the same evidence unquestionably affords substantial sup-

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port for the Commission's approval of the lower charges now assailed.

In this connection we cannot do better than quote what the district court said as to the lower scale of charges approved by the Commission (R. 214):

> Plaintiffs assert that they were not given an opportunity to be specifically heard upon the reasonableness of the reduced rates of $1.05, $1.35, and $1.65 per ton, and claim that they were thereby denied due process. But the Commission had just concluded, not one but two, exhaustive and comprehensive investigations of the entire subject of unloading charges at these points, based upon the higher rates then in effect, during which plaintiffs, and others, were afforded a full opportunity to be heard upon all phases of the subject. As a result of these hearings, the Commission found the existing rates too high, but that the reduced rates above mentioned would be reasonable, and that the charge was justified as for an additional service.
>
> Instead of merely setting aside the old rates, thus leaving the matter undetermined, the Commission brought the controversy to a close by setting the old rates aside "without prejudice to the establishment of charges in conformity with the views expressed herein," that is, in the Commission's report. The carriers then put the reduced rates into effect.
>
> Having just completed a thorough investigation of the entire subject, during which

> plaintiffs were fully heard, it would have been a work of supererogation to conduct a further hearing upon these lower rates, the reasonableness of and justification for which was already shown by the evidence. It was clearly within the Commission's power not only to condemn the then existing rates as unreasonable, but at the same time and upon the evidence already taken to fix rates that would be just and reasonable. In this, there was no denial of due process to plaintiffs. Plaintiffs were fully heard upon the entire matter. The situation is the same in principle as where a plaintiff demands $1,000 of a defendant, the court finding that he is not entitled to $1,000 but that on the evidence he is entitled to $500, and awards that sum. In these circumstances the defendant could not complain of a denial of due process because he was not again heard on his liability for $500. *Akron, C. & Y. Ry. Co.* v. *United States, D. C.,* 22 F. 2d 199, 203.

(See also *Tagg Bros.* v. *United States,* 280 U. S. 420, 440–1.)

Among the most important subordinate findings made by the Commission, certainly ones which afford an equitable, just, and reasonable basis for its ultimate finding and conclusion, are the findings that the consignees derive substantial benefits from performance of the unloading service by the carriers, and that the cost of the service should be borne partly by the consignees and partly by the carriers. Those findings, inso-

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far as they pertain to unloading performed at pier stations in New York, are supported by undisputed evidence that:

(a) Consignees are notified in advance of arrival of loaded cars at piers. (R. 23j.)

(b) Space on the piers is allocated for each consignment. The piers are generally mapped out so as to give each consignee a specified location for his portion of the contents of the cars after unloading. (R. 23j.)

(c) Consignees are permitted to display the shipments at those locations on the piers, thus facilitating inspection of the commodities by prospective purchasers. (R. 23k.)

(d) After being unloaded the fruit is sold at public auction in auction rooms on the piers. (R. 23k.)

(e) Cantaloups and melons are sold at private sales on the pier floor where the packages are displayed. (R. 23k.)

(f) All of the above-listed services are furnished by the carriers without charge and as incidents of the unloading service performed by them.

(g) The pier stations are located adjacent to the wholesale produce markets in lower Manhattan, hence pier-station delivery saves the consignees the extensive trucking operations which would be required in connection with team-track delivery. (R. 23–1.)

The evidence also shows benefits to the appellant, the City of New York, from pier-station delivery, over and beyond the above-listed benefits derived by its inhabitants and business establishments. These benefits include an avoidance of the increased traffic congestion which would result from trucking all fruit and vegetable shipments from team tracks either in Manhattan or New Jersey (R. 23–1). It would appear that the Port of New York Authority, also an appellant herein, is likewise benefited by pier-station delivery, for the reason that its Hudson River tunnels and bridges are thereby relieved of the heavy volume of truck traffic which delivery and unloading at New Jersey team tracks would necessitate.

The Commission's findings and comments in this connection are pertinent. The following appears in its final report (R. 24z):

> Protestants' contention, that as respondents do not provide team tracks adjacent to the pier stations or sufficient team tracks at other points on Manhattan to accommodate the fruit and vegetable shipments the cost of the unloading must be borne by the respondents, is unsound. Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is *a general community problem* and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing diffi-

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> culties if this congested area is to be served by railroad transportation. Adequate team tracks at respondents' other stations on Manhattan might constitute sufficient answer to protestants' contention. Although it seems that such existing team tracks could not handle all of the fruit and vegetable traffic which now moves through the pier stations, there is little likelihood that the shippers would divert any substantial amount of this traffic from the pier stations as long as they are able to obtain the present terminal services at costs which are not unduly burdensome to them or unduly disproportionate as compared with total costs to them of a satisfactory substitute for pier deliveries. Respondents are under no obligation to provide an excessive amount of terminal service or a particular type of service for which there is no reasonable expectation that it will meet a public need. * * * (Emphasis supplied.)

There can be no question, therefore, that there is substantial evidence to support the finding that the consignees as well as the railroads benefit from pier-station delivery and unloading at New York and that the cost of such unloading should be borne in part by each group.

There is also substantial evidence of benefits to consignees from unloading performed by the carriers at produce terminal platforms at Philadelphia, including the following:

(a) In connection with such unloading, the commodities are sorted by the carriers without additional charge. (R. 23x.)

(b) Consignees are permitted to display the commodities for sale on the platforms, and to exhibit them to prospective buyers for inspection. (R. 23s.)

(c) An auction company, acting for the consignees, is permitted to conduct auction sales at one of the Philadelphia platforms, and consignees are permitted to sell the commodities privately at the other. (R. 23s.)

In this connection the Commission made the following specific findings as to unloading at Philadelphia (R. 23y):

> The team-track facilities are sufficient to accommodate a large number of cars. *There is no indication that these facilities are inadequate* to accommodate the fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services. However, *team-track delivery is not desired for fruit, the auction facilities being more desirable.* (Emphasis added.)

Considering these benefits from platform delivery enjoyed by consignees at Philadelphia, and the fact that they prefer platform delivery of fruit to team-track delivery, and also considering the cost to the railroads of performing the unloading at produce platforms, we reiterate that the evidence abundantly supports the finding and

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conclusion that the shippers or consignees should pay a part of the unloading costs.

In reaching its conclusion that the cost of unloading should be borne partly by the shippers or consignees and partly by the railroads, the Commission considered "of major importance" evidence that the level of the line-haul rates for transporting carload shipments of fresh fruits and vegetables from producing points to New York and Philadelphia "is no higher than the rates to other consuming points where shippers [or consignees] unload or charges are assessed for unloading" (R. 23aa). It is essential to bear in mind, in this connection, that at all principal eastern cities except New York and Philadelphia the practice of rail carriers in unloading carload shipments of such commodities without a separate unloading charge had been discontinued long prior to 1948 when unloading charges first became effective at those two points (R. 24c). The evidence that, on shipments moving to eastern cities other than New York and Philadelphia, the carriers had for many years assessed and collected unloading charges, separate from and in addition to the line-haul rate, shows beyond a doubt that the unloading service performed at those other cities was not included in the line-haul transportation. That being the situation at cities other than New York and Philadelphia, we submit there is no reason why it should not be permitted at those two cities also. As a matter of fact, the

establishment of the unloading charges herein assailed makes applicable at New York and Philadelphia the same rule which is of nearly universal application, viz., that rail carriers load and unload carload shipments only at specific stations and only when additional charges are assessed for unloading.

Another persuasive circumstance is that the line-haul rates to New York were the same whether the unloading was performed by the carriers at pier stations or by the consignees at team tracks. Likewise, the line-haul rates to Philadelphia were the same on shipments unloaded by the carriers at produce platforms as on those unloaded by the consignees at team tracks. This is but further proof that the rates for line-haul transportation did not necessarily cover the service of unloading when performed by the carriers.

Lastly in this connection, the evidence shows that the cost of unloading at pier stations in New York and at produce terminal platforms in Philadelphia has increased sharply in recent years (R. 23j), and has reached figures much higher than the scale of unloading charges approved by the Commission (R. 23bb) and now assailed. The carriers were willing to absorb and did absorb the cost of unloading for many years, until it became too burdensome (R. 23z). This is a factor which the Commission properly could and did consider in reaching its decision that it would be

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"just and reasonable" for the consignees to bear a part of the cost.

It is submitted, therefore, that the Commission was warranted by the law and by the evidence in its conclusion that the approved unloading charges were not shown to be unjust and unreasonable.

II

In consideration of the differences in the circumstances and conditions as between the unloading of fresh fruits and vegetables at New York and the unloading there of other commodities without charge, the Commission was warranted in its conclusion that the approved unloading charges were not shown to be unduly prejudicial and preferential or unjustly discriminatory

The appellant, the Secretary of Agriculture, contends that the unloading charges on fresh fruits and vegetables at New York are an unjust discrimination or an undue or unreasonable prejudice or disadvantage, in violation of Sections 2 and 3 (1) of the Interstate Commerce Act, inasmuch as no similar charges are imposed on any other freight there unloaded by the carriers. The Commission, in its motion to affirm, took the position that this question was not properly before this Court on appeal because it was not raised in the District Court. *United States* v. *Hoffman,* 335 U. S. 77, 79; *United States* v. *Ruzicka,* 329 U. S. 287, 296; *Kay* v. *United States,* 303 U. S. 1, 5.

While we are still of the opinion, for the reason stated, that the question of unjust discrimination

or undue and unreasonable prejudice is not properly before this Court, the Commission's report shows that certain of the appellants had alleged in this proceeding that Sections 2 and 3 "would be violated if charges are made for unloading fresh fruits and vegetables at the respective piers, while continuing the free unloading of other commodities at the same locations" (R. 24r). The Commission found, however, that although the movement by carfloat to the piers is the same with respect to other commodities as with respect to fresh fruits and vegetables (R. 23i), the "circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables" (R. 24r).

The evidence does not show, for example, that the numerous and substantial benefits hereinabove described, which are enjoyed by consignees as incidents of the unloading by the carriers of fresh fruits and vegetables, are likewise enjoyed by consignees of other commodities also unloaded. As already stated, consignees of fresh fruits and vegetables unloaded at pier stations enjoy, in connection with the unloading, and without any additional charge, the benefit of what amounts to a wholesale produce mart where they display and sell their merchandise both at auction and at private sales. The evidence shows no such benefits to consignees of other commodities unloaded

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by the carriers. That is to say, dairy products, eggs, and the other commodities alleged by the appellants to be preferred over fresh fruits and vegetables, do not share in the auction facilities and other benefits enjoyed by fresh fruits and vegetables. This factor, without more, is sufficient to show that the circumstances and conditions surrounding the unloading of the two classes of commodities are not the same and that the questioned unloading charges are not unjustly discriminatory or unduly prejudicial as against fresh fruits and vegetables.

In deciding this question adversely to the contention now made by the Secretary of Agriculture, the Commission was following the long-established rule that in order to sustain a finding of unjust discrimination it must appear that the property transported is "like traffic" and that the transportation service is performed under substantially similar circumstances and conditions. *Richmond Chamber of Commerce* v. *Seaboard A. L. R. Co.,* 44 I. C. C. 455, 464; upheld in *Seaboard A. L. R. Co.* v. *United States,* 254 U. S. 57.

The Commission's hearing examiner, in his proposed report, cited as an example of unjust discrimination and undue preference the fact that "canned fruit juices originating at points in Florida are unloaded without additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables." The examiner

also referred to the "keen competition between fresh fruits and fruit juices in household consumption." (R. 114.) It is readily apparent, however, that fresh fruits and canned fruit juices are not "like traffic" and that the unloading of the two classes of commodities is not performed under "substantially similar circumstances and conditions." The two types of traffic are packed differently, they require different handling, and upon unloading they receive quite different treatment. Fresh fruits and vegetables being perishable, the trade therein finds extremely valuable, perhaps almost indispensable, the quick method of selling facilitated by the pier-station display and sales facilities which are incidents of carrier-unloading; whereas canned fruit juices, not being perishable, do not require and do not receive such beneficial handling.

In *Nashville Railway Co.* v. *Tennessee,* 262 U. S. 318, 322, this Court, in an opinion by Mr. Justice Brandeis, said: "Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case". The Commission has made its determination of this question of fact, based upon all the evidence in this case. We submit that its determination that there is no unjust preference or prejudice should not be set aside.

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III

The Commission was warranted in its conclusion that the unloading charges at New York and Philadelphia should be the same

The Secretary of Agriculture contends, also, that the Commission's conclusion that the unloading charges should be the same at New York and Philadelphia is not supported by adequate findings and substantial evidence. Supporting his argument the Secretary points out that the Commission's report shows that unloading costs at Philadelphia are lower than at New York.

The Commission dealt with this question in its first report, saying: "The same schedule of charges was published for application at both New York and Philadelphia because of the long-standing competitive relation between those cities" (R. 24c). Also: "The cost of service is less at Philadelphia than at New York, but no separate charge for special sorting and stacking is made at that point [Philadelphia]. Furthermore, the record indicates the desirability of a parity of charges for unloading at New York and Philadelphia" (R. 24r).

The same finding was made in the second report, after rehearing and further hearing: "As indicated in the prior report, it is desirable that the charges for unloading at New York and Philadelphia be the same" (R. 23bb).

Thus the finding that the unloading charges at the two cities should be the same appears to

be based upon two considerations. One of them is that although the cost of unloading at Philadelphia is less than at New York, no separate charge for special sorting and stacking is made by the carriers at Philadelphia, whereas such a charge is made at New York. We submit that the undisputed evidence to this effect, without more, affords a rational basis for the finding that the unloading charges should be the same at the two cities. That a special charge is made for sorting and stacking fruits and vegetables at New York and not at Philadelphia is a strong circumstance, it seems to us, justifying the imposition of unloading charges at Philadelphia representing a higher proportion of the unloading costs than do the charges imposed at New York.[8] Otherwise stated, the unloading charges at Philadelphia are off-set, to some extent, by reason of the sorting and stacking services there performed without charge.

The Commission's other stated reason—that "the record indicates the desirability of a parity of charges for unloading" at the two cities—is more general, it is true, but we think it affords an equally sound basis for the conclusion reached. By the statement that "the record indicates" the Commission doubtless meant that it had decided, upon consideration of the entire record and all the circumstances and conditions shown by it,

[8] At both New York and Philadelphia the present charges are much below the cost of unloading.

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that the charges should be the same at the two cities. We submit that in doing so the Commission was acting within its statutory authority and discretion as the administrative rate-making agency. That its power and authority in such matters are very broad is shown by what this Court said in *Atchison, T. & S. F. R. Co.* v. *United States,* 232 U. S. 199, 220–1:

> What is a proper rate on fruit in precooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services, are all rate-making matters committed to the Commission. It may determine what shall be the difference in rate between carload and less than carload lots; it may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. It may prescribe the form in which schedules shall be prepared and arranged (Sec. 6), and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. *All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such*

> *power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void.* * * * (Emphasis added).

United States v. *Chicago Heights Trucking Co.,* 310 U. S. 344, dealt with alleged rate discriminations, and we think what the Court there said is authority for the proposition that the Commission has the power to determine on the evidence before it that the unloading charges should be the same at New York and Philadelphia. We quote from the opinion (at pp. 350–353):

> Respondents contend that the Commission improperly concluded that the canceled tariffs create undue preference or advantages resulting in unjust discriminations in violation of [section] 216 (d) *because there was no evidence* that the suspended rates would subject any particular person or type of traffic to disadvantage or injury; * * *
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> * * * * *
>
> * * * So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. * * * *And*

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> *the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts,* of the existence of forbidden preferences, advantages, and discrimination. (Emphasis added.)

And in *Ayrshire Corp.* v. *United States,* 335 U. S. 573, 593, the Court said:

> * * * We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that *the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked.* * * * (Emphasis added.)

It is worth noting in this connection that, while the Secretary of Agriculture appears to contend that if any unloading charges are to be allowed the charges should be less at Philadelphia than at New York, at least one of the appellants, The Port of New York Authority, does not subscribe to that view, in fact seems to take a directly contrary position. We quote the following from

pages 1019–1021 of the Record, in connection with the testimony of Edward K. Laux, traffic manager for and a witness on behalf of the Port Authority:

By Mr. MILLER [attorney for the railroads]:

Q. Can you tell me whether the Port Authority would be opposed to a reduction in the level of charges at Philadelphia as compared with those at New York?

A. Which charges are you talking about?

Q. These charges.

A. Unloading charges? Our position is simply this—I think I made it plain in my testimony—we want the charge abolished entirely. We are not concerned directly.

Q. I understand that, Mr. Laux. My question is, would you be opposed or in favor of a difference in charges for unloading this traffic at Philadelphia as against New York.

Mr. LAROE [attorney for Port Authority]. To the disadvantage of New York.

By Mr. Miller:

Q. Well, assuming that the charges would be lower at Philadelphia than at New York.

A. Well, my answer would be, we are opposed to any kind of a charge, whether it is lower or higher. If there is a charge, we are against it.

Q. Assuming there is going to be a charge at both places, would you be op-

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posed to or in favor of the publication of lower charges at Philadelphia?

Mr. LaRoe. I do not think we should be called upon to answer that, Mr. Examiner, because it is not in issue. I want to be frank with counsel; in similar cases in the past we have taken the position of opposition to anything that would operate to the disadvantage of New York in that manner, and I should think we probably would take that same position if an attempt were made to favor Philadelphia. But that issue is not here.

Mr. Miller. The issue is raised, Mr. Examiner, by a number of the petitions for reopening and reconsideration.

Exam. Brown. That is correct. And the question is what is the position of the Port of New York Authority. I think that is a question you might ask of counsel.

Mr. Miller. Very well, Mr. LaRoe.

Mr. LaRoe. Well, our position regarding that is that, as Mr. Laux has well explained, there should be no charge for unloading at all. Now, if there is a proposal to favor Philadelphia in that matter, I should think that we would have to oppose it. But our Port Authority has not acted on any such thing as yet, and I am hesitant to take the position in absence of official action.

In other words, I, as a lawyer, cannot determine their policy. I can only determine what their policy will be, and I think it will be a policy of opposition.

Exam. BROWN. When you refer to discrimination and prejudice during the course of your testimony, then you were not referring to Philadelphia in any respect?

Mr. LAROE. We were not, no sir.

The WITNESS. No, sir.

* * * * *

It is submitted, therefore, that the Commission's conclusion that the unloading charges at New York and Philadelphia should be the same is based upon adequate findings, supported by substantial evidence, and was not unjustly discriminatory or unduly prejudicial or preferential.

CONCLUSION

For the reasons herein set forth, it is submitted that the judgment of the District Court should be affirmed and the orders of the Commission sustained.

Respectfully,

EDWARD M. REIDY,
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Commerce Commission, Appellee.

APRIL 1954.

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APPENDIX

The following are the pertinent provisions of the Interstate Commerce Act (49 U. S. C. Sec. 1, *et. seq.*):

SEC. 1 (3) (a). "* * * The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported * * *" (49 U. S. C. Sec. 1 (3) (a)).

SEC. 1 (5). "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful" (49 U. S. C. Supp. V Sec. 1 (5)).

SEC. 2. "That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for

him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful" (49 U. S. C. sec. 2).

SEC. 3 (1). "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description" (49 U. S. C. Sec. 3 (1)).

SEC. 6 (1). "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over

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the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part." (49 U. S. C. Sec. 6 (1))

SEC. 6 (7) "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor

shall any carrier charge or demand or collect or receive a greater or less different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs (49 U. S. C. Sec. 6 (7)).

SEC. 15 (6) "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be

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received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge" (49 U. S. C. Sec. 15 (6)).

SEC. 15 (7) "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal peading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier

or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge,

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classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible" (49 U. S. C. Sec. 15 (7)).

SEC. 15a (2) "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service" (49 U. S. C. Sec. 15a (2)).

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